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IN THE

Supreme Court of the United States

SPRING TERM 1981

NO. 80-1963

RUPERT BELL,
Petitioner-Appellant

versus

HERBERT HAROLD HINKLE,
Respondent-Appellee

On Writ of Certiorari To The United States Supreme Court From the Supreme Court Of The State of Texas

REPLY OF RESPONDENT TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE JUDGMENT OF THE COURT BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

SUBJECT INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACT	5
ARGUMENT	5
CONCLUSION	8
CERTIFICATE OF SERVICE	8
APPENDIX	9

LIST OF AUTHORITIES

CASES	Page
Bell v. Hinkle, 562 S.W.2d 35 (Tex. Civ. App.—Houston [14th] 1978, writ ref'd., n.r.e.)	3
Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789	7
Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518 (12/11/78)	5
TEXAS RULES OF CIVIL PROCEDURE	
Rule 483	2
TEXAS PROBATE CODE	
Section 2(d)	2, 6
Section 5	3
Section 42	3, 6
Section 48	3
TEXAS FAMILY CODE	
Chapter 13	4, 6
Section 13.01	4
Sections 13.08 through 13.09	2, 6
Section 13.24	2, 6

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We (for Hinkle) reply to the Petition under the same headings adopted by Petitioner (Bell) correcting errors therein.

OPINION BELOW

Petitioner (Bell) errs in stating that the Supreme Court's refusal of Bell's petition for writ of error, No Reversible Error, had the effect of "affirming the ap-

pellate court's opinion". Under Rule 483, Texas Rules of Civil Procedure, the No Reversible Error notation affirms the result below, but does not approve the reasoning. The Supreme Court's action signifies approval of the result on the whole record.

JURISDICTION

We contend that this Court does not have jurisdiction in that the judgment of the Court below rests on adequate and independent State grounds and petitioner is improperly requesting an advisory opinion of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

To supplement the items copied in Petitioner's Appendix B, we append hereto copies of the following:

Texas Rules of Civil Procedure, Rule 483, First Paragraph;

Family Code, Sections 13.08 through 13.09, as enacted in 1975.

Family Code, Section 13.24, reenacted in 1975 by renumbering from 1973 Act.

Probate Code, Section 2(d) (Effective 1956).

QUESTION PRESENTED

I. WHETHER THE JUDGMENT OF THE COURT BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

STATEMENT OF THE CASE

With regard to the first state court appeal of this case, the limitation pleas raised by Hinkle were not pleas to the jurisdiction as claimed by Bell (Petition, p. 4), but were pleas in bar. They were never dealt with by the appellate court. The only plea to the jurisdiction was Respondent's (Hinkle) assertion that the Trespass to Try Title action was one principally for declaration of heirship, disguised as Trespass to Try Title, and was exclusively within the jurisdiction of the County Court of Brazoria County sitting in Probate under the provisions of Probate Code Secs. 48 and 5. This plea was sustained by the Trial Court and overruled by the Appellate Courts (*Bell v. Hinkle*, 562 S.W.2d 35 (Tex. Civ. App.—Houston [14th] 1978, writ ref'd., n.r.e.). On subsequent trial, the jury verdict was that J. T. Hinkle was not proved to be the father of Bell; and on this verdict the trial court entered its judgment.

The Court of Civil Appeals did not pass upon any racial issue, or the issue of paternity *vel non*, but decided the case purely on the holding that Petitioner had failed to follow Texas requirements in advancing his cause. The heart of the appellate opinion is in two sentences:

> "Since appellant has not brought a paternity suit under the Family Code, or met any of the other conditions [of Probate Code Section 42], he can not recover under the statute."
>
> "Since appellant has not proved his cause of action, we do not reach appellant's points of error, and affirm on appellee's crosspoint."

The issue raised and disposed of in the Court of Civil Appeals was whether Bell had brought and proved the type of action necessary to resolve the question of paternity, an affirmative finding of which is a prerequisite to the determination of the inheritance rights of an illegitimate. This issue was not raised for the first time in oral argument in the appellate court, but was duly made and preserved in the trial court and in the initial brief in the Court of Civil Appeals.

The Court of Civil Appeals did *not* make any rulings on:

— whether Petitioner's cause of action was barred under the one year Statute of Limitations contained in Section 13.01 of the Family Code, or any other limitation statute;

— whether the one year Statute of Limitations contained in Section 13.01 of the Family Code is unconstitutional; or

— whether defense counsel's remarks during the trial constituted reversible error.

These questions are therefore not properly before this Court.

The Court of Civil Appeals did rule that, in order for this Petitioner to establish his inheritance rights, if any, he was required first to have the issue of paternity determined in accordance with the procedures and tests provided for in Chapter 13 of the Family Code. Petitioner simply did not meet his burden of pleading and proof in this case as required by Texas law.

STATEMENT OF FACT

Bell waited until 1976, 7 years after J. T. Hinkle's death, and after Hinkle's widow and associates and kinsmen were dead, before making any claims. Bell is now almost 60 years old.

The Petitioner confuses what he *claims* with what is established fact. It is not established, but denied, that J. T. Hinkle was Bell's father. The claimed sexual activity is also not established, but denied. The assertion that Bell worked as a hand on J. T. Hinkle's land all his life is contrary to the evidence. The Court of Civil Appeals did not hold that Bell would not be entitled to the sought inheritance even if a jury in a paternity case brought under the Family Code would find J. T. Hinkle to be his father; rather the Court held that Petitioner failed to properly plead and prove his asserted cause of action in this Trespass to Try Title suit.

ARGUMENT

The Texas law, as applied by the Texas Courts, is a reasonable effort by the State, in the exercise of its constitutional power, to achieve legitimate objectives by reasonable means. Bell was never recognized by J. T. Hinkle as his son; nor was Hinkle ever adjudicated to be Bell's father. *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518 (12/11/78).

The sections of the Texas Family Code dealing with paternity suits were enacted in 1975; they were in effect when Petitioner filed his suit in 1976, yet Petitioner chose not to follow the specific procedures for the determination of paternity set out therein. If Petitioner had followed the

procedures set out in Chapter 13 and had obtained a verdict that J. T. Hinkle was his father, the effect of the Decree establishing paternity would have been as follows:

> "The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child *as if the child were born to the father and the mother during marriage.*" (emphasis added)

Section 13.09, Family Code (effective September 1, 1975).

Recognition of fatherhood by J. T. Hinkle would have had the same effect. Family Code Sec. 13.24.

Under Section 2(d) of the Texas Probate Code, the proper Court had authority to disregard Section 42 of the Probate Code if its application to the particular facts would not further the legitimate purposes of the State. Texas Courts have always been open to entertain constitutional issues.

Petitioner chose not to bring a paternity suit under the Family Code as it modifies the Probate Code; rather, Petitioner plead in Trespass to Try Title. The Court of Civil Appeals has simply ruled that Petitioner, as a matter of law, failed to plead and prove a proper case for the establishment of his right to inherit from J. T. Hinkle, if any.

Respondent respectfully submits that the Court of Civil Appeals' judgment rests on adequate and independent state grounds, and therefore that this Court does not have jurisdiction in this proceeding brought by Petitioner.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall, 590, 636, 22 L.Ed. 429; Berea College v. Kentucky, 211 U.S. 45, 53, 29 S.Ct. 33, 34, 53 L.Ed. 81; Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644; Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limtiations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789.

CONCLUSION

Respondent respectfully prays that Petitioner's Application for Writ of Certiorari filed herein be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Respondent-Appellee's Reply to Petitioner's Application for Writ of Certiorari have been served upon Attorneys for Petitioner, Ms. Alison Pettiette, of Harvill & Hardy, 609 Fannin, 19th Floor, Houston, Texas 77002 and Mr. Sam Lee, P. O. Drawer R, 126 E. Locust Street, Angleton, Texas 77515 by Certified Mail, Return Receipt Requested, this the 19th day of June, 1981.

By: F. Joyce Cox
F. JOYCE COX

APPENDIX

SUPREME COURT RULE

Rule 483. ***Orders on Application for Writ of Error, Petition for Mandamus and Prohibition***

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation "Refused. No reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

§ 13.08. *Decree*

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Added by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

§ 13.09. *Effect of Decree Establishing Paternity*

The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

Added by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

§ 13.24. *Validation of Prior Statements*

A statement acknowledging paternity or an obligation to support a child which was signed by the father before January 1, 1974, is valid and binding even though the statement is not executed as provided in Section 13.22 of this code and is not filed with the State Department of Public Welfare or with the court.

Amended by Acts 1975, 64th Leg., p. 1261, ch. 476, § 24, eff. Sept. 1, 1975.

1975 Amendment, substituting "Section 13.22" for "Section 13.02" of 1973 act.

§ 2(d) *Severability.* If any provision of this Code, or the application thereof to any person or cricumstance, is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable, and the Legislature hereby states that it would have enacted such portions of the Code which can lawfully be given effect regardless of the possible invalidity of other provisions of the Code. (1956)